Mwinyihaji v Mwebeyu & another (Civil Appeal E075 of 2022)
[2025] KECA 868 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 868 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E075 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

MAY 23, 2025

BETWEEN

SULEIMAN M. MWINYIHAJI ..... APPELLANT

AND

OMAR SALIM MWEBEYU ..... 1ST RESPONDENT

VINCENT KARHAYU ..... 2ND RESPONDENT

(An Appeal from the whole decision and judgment of the Environment and Land Court at Mombasa dated and signed at Iten on 2nd June, 2022 (L.N. Waithaka, J.) and read, signed and delivered at Mombasa on 21st June, 2022 by (Munyao Sila, J.) in ELC No.194 of 2015)

JUDGMENT

1. The Appellant, Suleiman M. Mwinyihaji filed suit against the Respondents seeking a declaration that he is the owner of the parcel of land known as Plot Number 826 Bububu Settlement Scheme (the subject land); a permanent injunction to restrain the Respondents from trespassing, erecting a structure or in any other way interfering with the subject land; mesne profits; costs and interests.

2. The Appellant's case was that he is the allotee of the subject land, having been issued with a letter of allotment dated 31st January 2002. He claimed to have paid the requisite deposit to the Settlement Fund Trustee (SFT) on 24th July 2002, but was not issued with a title deed thereafter. He stated that, on or about 28th October 2013, the 1st Respondent and his entire family invaded the subject land claiming that it was their ancestral land and, after so doing, he purported to sell off a portion of the subject land.

3. He stated that the matter was reported to the District Officer (D.O) Logo Division, Chief Mtongwe Location, who advised the Respondents to desist from interfering with the land as the 'land records were in his favour'. He claimed that despite the warnings, the Respondents began to erect structures on the land, which led to the filing of the suit.

4. It was his evidence that he was allotted the subject land by the Ministry of Lands Housing and Urban Development and had paid the required fees on 31st January 2002 whereupon, he took possession of the subject land, which the Respondents invaded in 2015.

5. In cross examination, he confirmed that the receipt for payment was issued to Ostah Suleiman, and that the letter of offer indicated that payment was to be made within 90 days from the date of the letter, but he made payments on 24th July 2002.

6. In their response, the 1st Respondent claimed that he was a stranger to the allegation that the subject land was allocated to the Appellant. He claimed that he owned parcel No. Bububu "B" 'Adjudication Section Likoni located in Mombasa and denied having invaded the Appellant's land and selling it to the 2nd Respondent. He stated that the land he sold to the 2nd Respondent was his parcel of land, which was his ancestral land; that the subject land was allotted to his grandfather, inherited by his father and, thereafter, passed down to him. He also claimed to have been born on the subject land and had lived there for 69 years; that the suit parcel is unsurveyed land; and that it was never allocated to the Appellant.

7. The 1st Respondent's case was supported by the evidence of Kassan Mohamed Said (DW2), who stated that the subject land was unsurveyed land and that the 1st Respondent has been residing thereon since birth. DW 2 stated that he shared the boundaries to the subject land with the 1st Respondent since 1973, and that the Appellant was a stranger to them.

8. The 2nd Respondent filed a defence out of time, which was struck out.

9. The trial Judge, upon considering the matter, held that the Appellant failed to prove that he was the owner of the subject land; that it was clear that he made payment for the parcel after the period stipulated in the offer letter had lapsed; that the Appellant's boundaries of the subject land were not established;

   and that the map did not show whether the subject land was situated in either Bububu Settlement Scheme A or B. Having so concluded, the trial Judge proceeded to dismiss his suit.

10. Aggrieved, the Appellant has filed an appeal to this Court on the grounds that the learned Judge was in error in placing a higher standard of proof than is required in Civil proceedings, hence reached a wrong decision and judgment; in laying emphasis on the existence of two schemes against the clear documentary evidence contained in the Appellant's list of documents and, by so doing, reached a wrong decision; in entertaining an extraneous document, namely a map which was not part of the list of documents, and which was not in any way referred to in the proceedings by any party leading to a wrong decision; in making analogies findings between the Appellant and the Department of Adjudication and Settlement without regard to the fact that they were not party to the proceedings and against the principles of Natural Justice; in construing the Respondents prolonged stay on the subject land without taking into account the time honored principle that times does not run against the State; in failing to consider that the proceedings took a very long time to conclude due to the fact that the Judge was undergoing disciplinary action, to the prejudice of the Appellant's land sold to the 2nd respondent, and which belonged to him.

11. This being a first appeal from a decision of the trial court, the mandate of this Court is as explicitly set out in rule 31(1) of the Rules of this Court. It provides:

    (1) On any appeal from a decision of a superior court, acting in exercise of its original jurisdiction, the Court shall have power –

a. To reappraise the evidence and to draw inferences of fact; and

b. In its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court."

12. In a plethora of cases, this Court has variously delineated the parameters of the exercise of its mandate. In the often-cited case of Selle vs Associated Motor Boat Co. [1968] E.A 123, this Court expressed itself thus:

> ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

13. This appeal turns on the singular issue as to whether the Appellant proved his claim over the subject land to the required standard.

14. It was the appellant's case that he was issued with an allotment letter dated 31st January 2002. According to the letter of allotment, the Appellant was offered the subject land in Mombasa. The letter indicated that the offer was valid for 90 days within which the Appellant was to make the requisite payments and obtain title to the subject land failure to which the offer would be cancelled. The Appellant made payments on 24th July 2002, two months after the stipulated period. He stated that he was not issued with a title deed.

15. It is trite law that in order for an allotment letter to become operative, the allotee was required to comply with the conditions of allotment set out in the letter.

16. In the case of Dr. Joseph N.K. Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others Civil Appeal No. 60 of1997 this, Court held:

> " It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offeror and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land."

17. In the case of Torino Enterprises Ltd vs. Attorney General [2023] KESC 79 (KLR), the Supreme Court held that:

> "It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein...Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfilment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter."

18. The above excerpt is clear that, since the Appellant did not comply with the conditions of the allotment letter, he did not acquire title to the subject land. Our reanalysis of the evidence would lead us to

conclude, as did the learned Judge, that the Appellant did not demonstrate that he had complied with the stipulations in the letter of allotment, with the result that he failed to acquire title to the subject land. It is trite that it is a valid and legally acquired title that confers ownership rights to land, and not the letter of allotment.

19. A further consideration of the evidence begs the question as to which exact parcel the Appellant was claiming. In his pleadings, the Appellant claimed that he was allocated Plot number 826 Bububu Settlement Scheme.

20. In his defence, the 1st Respondent stated that his parcel is Plot Number 826 Bububu "B" Settlement Scheme.

21. It is worthy of note that nothing in the Appellant's case indicated that the subject land was located in Bububu 'B'. It is also instructive that both the allotment letter and the map were silent on the location of the land the Appellant claimed. Notwithstanding that during cross-examination the Appellant stated that the concerned Bububu Settlement Scheme comprises Bububu"A" and Bububu "B", he did not state whether the subject land was located in Bububu "A" or Bububu "B". The lack of specificity as to the actual location of the land he was claiming would lead us to conclude that the Appellant did not prove his claim to ownership of the subject land to the required standard.

22. Parties are bound by their pleadings and any evidence produced by the parties which is not supportive of, or is at variance with, what is stated in the pleadings must be disregarded. (See IEBC & Another -vs- Stephen Mutinda Mule [2014] eKLR; Wachira vs Golden Tea Traders & 3 others [2025] KECA 254 (KLR); and Wandemi Developers Limited vs Ndegwa [2025] KECA 431 (KLR).

23. In failing to prove the location of the subject land, the Appellant failed to establish that the land the Respondents occupied belonged to him and, as a consequence, failed to prove that the Respondents had trespassed on land belonging to him.

24. In sum, the appellant failed to prove ownership of the subject land. The appeal is lacking in merit and is accordingly hereby dismissed with costs to the Respondent.

25. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR